

AMENDED IN ASSEMBLY APRIL 6, 2005

CALIFORNIA LEGISLATURE—2005–06 REGULAR SESSION

ASSEMBLY BILL

No. 1124

Introduced by Assembly Member Wyland

February 22, 2005

An act to amend Section ~~3550~~ of the Labor Code 606.5 of, and to add Section 13004.3 to, the Unemployment Insurance Code, relating to ~~workers' compensation~~ employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 1124, as amended, Wyland. ~~Workers' compensation: notice~~
Taxation: employees.

Existing law requires employers to make specified payments and withholdings from wages paid for employment. Existing law requires that those employers' payments and withholdings be paid to the Employment Development Department. Existing law excludes services performed by independent contractors from the definition of employment.

This bill would deem an individual not to be an employee of an employer for these purposes if the employer has not treated the person as an employee and the tax returns filed by the employer consistently treat the individual other than as an employee. The bill would also specify the circumstances under which an employer has a reasonable basis for treating an individual other than as an employee, and would extend the period for filing a claim for refund or credit of taxes or unemployment contributions as a result of the enactment of these provisions by one year from the effective date of this bill, if those claims have not already been barred. The bill would require the department to provide an employer with written notice of these provisions at or before the time of any audit inquiry relating to the

employment status of any individual who performs services for the employer. The bill would enact other related provisions.

~~Existing workers' compensation law requires employers to secure the payment of workers' compensation, including medical treatment, for injuries incurred by their employees that arise out of, or in the course of, employment.~~

~~Existing law makes it a misdemeanor for any employer subject to the workers' compensation provisions to fail to post and keep posted in a conspicuous location frequented by employees, and where the notice may be easily read by employees during the hours of the workday, a notice that states the name of the current compensation insurance carrier of the employer, or when such is the fact, that the employer is self-insured, and who is responsible for claims adjustment.~~

~~Existing law provides that failure to post the above notice shall automatically permit the employee to be treated by his or her personal physician with respect to any injury occurring during that failure.~~

~~This bill would delete that provision.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~ yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 ~~SECTION 1. Section 3550 of the Labor Code is amended to~~
2 ~~read:~~

3 ~~SECTION 1. Section 606.5 of the Unemployment Insurance~~
4 ~~Code is amended to read:~~

5 ~~606.5. (a) Whether an individual or entity is the employer of~~
6 ~~specific employees shall be determined under common law rules~~
7 ~~applicable in determining the employer-employee relationship,~~
8 ~~subject to the provisions of Section 13004.3, except as provided~~
9 ~~in subdivisions (b) and (c).~~

10 ~~(b) As used in this section, a "temporary services employer"~~
11 ~~and a "leasing employer" is an employing unit that contracts with~~
12 ~~clients or customers to supply workers to perform services for the~~
13 ~~client or customer or client and performs all of the following~~
14 ~~functions:~~

15 ~~(1) Negotiates with clients or customers or clients for such~~
16 ~~matters as time, place, type of work, working conditions, quality,~~
17 ~~and price of the services.~~

1 (2) Determines assignments or reassignments of workers, even
2 though workers retain the right to refuse specific assignments.

3 (3) Retains the authority to assign or reassign a worker to
4 other ~~clients or~~ customers *or clients* when a worker is determined
5 unacceptable by a specific ~~client or~~ customer *or client*.

6 (4) Assigns or reassigns the worker to perform services for a
7 ~~client or~~ customer *or client*.

8 (5) Sets the rate of pay of the worker, whether or not through
9 negotiation.

10 (6) Pays the worker from its own account or accounts.

11 (7) Retains the right to hire and terminate workers.

12 (c) If an individual or entity contracts to supply an employee
13 to perform services for a customer or client, and is a leasing
14 employer or a temporary services employer, the individual or
15 entity is the employer of the employee who performs the
16 services. If an individual or entity contracts to supply an
17 employee to perform services for a ~~client or~~ customer *or client*
18 and is not a leasing employer or a temporary services employer,
19 the ~~client or~~ customer *or client* is the employer of the employee
20 who performs the services. An individual or entity that contracts
21 to supply an employee to perform services for a customer or
22 client and pays wages to the employee for the services, but is not
23 a leasing employer or a temporary services employer, pays the
24 wages as the agent of the employer.

25 (d) In circumstances ~~which~~ *that* are in essence the loan of an
26 employee from one employer to another employer wherein
27 direction and control of the manner and means of performing the
28 services changes to the employer to whom the employee is
29 loaned, the loaning employer shall continue to be the employer of
30 the employee if the loaning employer continues to pay
31 remuneration to the employee, whether or not reimbursed by the
32 other employer. If the employer to whom the employee is loaned
33 pays remuneration to the employee for the services performed,
34 that employer shall be considered the employer for the purposes
35 of any remuneration paid to the employee by the employer,
36 regardless of whether the loaning employer also pays
37 remuneration to the employee.

38 *SEC. 2. Section 13004.3 is added to the Unemployment*
39 *Insurance Code, to read:*

1 13004.3. (a) Except as provided in subdivision (c), for the
2 purposes of this division, and for the purposes of determinations
3 under Section 606.5, an individual shall not be deemed to be an
4 employee of the employer unless the employer has no reasonable
5 basis for not treating the individual as an employee, if both of the
6 following apply:

7 (1) For purposes of withholding of employee personal income
8 taxes under this division and the payment of contributions to the
9 Unemployment Fund pursuant to Section 976 and to the
10 Employment Training Fund pursuant to Section 976.6, the
11 employer did not treat the individual as an employee for any
12 period.

13 (2) For any period after December 31, 1978, all state and
14 federal tax returns, including any information returns, that were
15 required to be filed by the employer with respect to an individual,
16 were filed on a basis consistent with the employer's treatment of
17 the individual other than as an employee.

18 (b) An employer has a reasonable basis for treating an
19 individual other than as an employee pursuant to subdivision (a)
20 if the employer reasonably relies on any of the following:

21 (1) A judicial precedent, a published ruling, technical advice
22 to the employer, or a letter ruling to the employer.

23 (2) A previous audit by the department of the employer, in
24 which no assessment of the employer was made that was
25 attributable to employment of persons holding positions
26 substantially similar to the position held by the individual, except
27 that an employer shall not be entitled to rely on an audit
28 commenced after December 31, 1996, unless that audit included
29 an examination related to determining whether the individual, or
30 any other individual holding a substantially similar position to
31 the position held by the individual, should be treated as an
32 employee of the employer.

33 (3) A longstanding recognized practice of a significant
34 segment of the industry in which the individual was engaged. For
35 the purposes of this paragraph, "longstanding" shall not be
36 construed to require the practice to have continued for a period
37 of time longer than 10 years, and a practice shall not fail to be
38 treated as longstanding solely because the practice began after
39 1978. For the purposes of this paragraph, "significant segment"
40 shall not be construed to require a showing that the practice is

1 engaged in by more than 25 percent of the industry, exclusive of
2 the employer.

3 (c) Subdivision (a) does not apply to any employer with
4 respect to the treatment of an individual for any period ending
5 after December 31, 1978, if the employer, or a predecessor of the
6 employer, has treated any person, holding a position
7 substantially similar to the position held by the individual, as an
8 employee for the purposes of the withholding of personal income
9 taxes or the payment of employer unemployment contributions
10 for any period beginning after December 31, 1977. The
11 determination as to whether an individual holds a position
12 substantially similar to a position held by another person shall
13 include consideration of the relationship between the employer
14 and the individual, and between the employer and those other
15 persons.

16 (d) If the refund or credit of any overpayment of any taxes
17 withheld under this division, or of any contributions made
18 pursuant to Section 976 or 976.6, resulting from the application
19 of subdivision (a) is not barred on the date this section becomes
20 effective, the period for filing a claim for refund or credit of an
21 overpayment shall not expire for a period of one year after the
22 date this section becomes effective.

23 (e) The department shall provide an employer with written
24 notice of the provisions of this section at or before the time of
25 commencement of any audit inquiry relating to the employment
26 status of any individual who performs services for the employer.

27 (f) This section shall not be construed to provide that it only
28 applies if the individual involved is otherwise an employee of the
29 employer.

30 (g) (1) If the employer establishes pursuant to this section that
31 the employer has a reasonable basis to treat an individual other
32 than as an employee, and the employer has cooperated fully with
33 reasonable requests of the department, then the burden of proof
34 shall shift to the department to prove otherwise.

35 (2) In the case of any issue relating to whether the employer
36 had a reasonable basis to treat an individual other than as an
37 employee pursuant to this section, paragraph (1) shall apply only
38 for purposes of determining whether the employer meets the
39 requirements of paragraph (1), (2), or (3) of subdivision (b).

1 (h) If an individual would, except for being treated by the
2 employer as an employee for any subsequent period, be deemed
3 to not have been an employee of the employer under subdivision
4 (a) for any prior period, then, for purposes of employer
5 withholding of personal income taxes or the payment of employer
6 unemployment contributions for the prior period with respect to
7 the individual, the individual shall be deemed to not be an
8 employee.

9 (i) The department shall not adopt any regulations or
10 guidelines, intended to clarify the employment status of any
11 individual for the purposes of withholding the personal income
12 taxes or the payment of employer unemployment contributions,
13 that are inconsistent with this section. As used in this subdivision,
14 “employment status” means the status of an individual, under the
15 usual common law rules applicable in determining the
16 employer-employee relationship, either as an employee or as an
17 independent contractor or a person in some status other than an
18 employee.

19 ~~3550. (a) Every employer subject to the compensation~~
20 ~~provisions of this division shall post and keep posted in a~~
21 ~~conspicuous location frequented by employees, and where the~~
22 ~~notice may be easily read by employees during the hours of the~~
23 ~~workday, a notice that states the name of the current~~
24 ~~compensation insurance carrier of the employer, or when such is~~
25 ~~the fact, that the employer is self-insured, and who is responsible~~
26 ~~for claims adjustment.~~

27 ~~(b) Failure to keep any notice required by this section~~
28 ~~conspicuously posted shall constitute a misdemeanor, and shall~~
29 ~~be prima facie evidence of noninsurance.~~

30 ~~(c) This section shall not apply with respect to the employment~~
31 ~~of employees as defined in subdivision (d) of Section 3351.~~

32 ~~(d) The form and content of the notice required by this section~~
33 ~~shall be prescribed by the administrative director, after~~
34 ~~consultation with the Commission on Health and Safety and~~
35 ~~Workers’ Compensation, and shall advise employees that all~~
36 ~~injuries should be reported to their employer. The notice shall be~~
37 ~~easily understandable. It shall be posted in both English and~~
38 ~~Spanish where there are Spanish-speaking employees. The notice~~
39 ~~shall include the following information:~~

40 ~~(1) How to get emergency medical treatment, if needed.~~

1 ~~(2) The kinds of events, injuries, and illnesses covered by~~
2 ~~workers' compensation.~~

3 ~~(3) The injured employee's right to receive medical care.~~

4 ~~(4) The rights of the employee to select and change the~~
5 ~~treating physician pursuant to Section 4600.~~

6 ~~(5) The rights of the employee to receive temporary disability~~
7 ~~indemnity, permanent disability indemnity, vocational~~
8 ~~rehabilitation services, and death benefits, as appropriate.~~

9 ~~(6) To whom injuries should be reported.~~

10 ~~(7) The existence of time limits for the employer to be notified~~
11 ~~of an occupational injury.~~

12 ~~(8) The protections against discrimination provided pursuant~~
13 ~~to Section 132a.~~

14 ~~(9) The location and telephone number of the nearest~~
15 ~~information and assistance officer.~~

16 ~~(e) The form and content of the notice required to be posted by~~
17 ~~this section shall be made available to self-insured employers and~~
18 ~~insurers by the administrative director. Insurers shall provide this~~
19 ~~notice to each of their policyholders, with advice concerning the~~
20 ~~requirements of this section and the penalties for a failure to post~~
21 ~~this notice.~~